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DATO' SRI DR MOHAMAD SALLEH ISMAIL & ANOR v. NURUL IZZAH ANWAR & ANOR

COURT OF APPEAL, PUTRAJAYA
ABANG ISKANDAR JCA
BADARIAH SAHAMID JCA
B MARY LIM JCA
[APPEAL NO: W-02(NCVC)(W)-481-03-2016]
14 FEBRUARY 2018

C ***TORT:*** *Defamation – Libel – Press conference contained statements alleged to be defamatory of plaintiffs – Allegation of misappropriation of funds – Whether there was falsity of impugned statements – Whether first defendant as Member of Parliament merely performing public duty of addressing issues of public concerns – Whether impugned statements proved to be defamatory – Whether defence of justification established – Defamation Act 1957, s. 8*

D ***TORT:*** *Defamation – Libel – Press conference contained statements alleged to be defamatory of plaintiffs – Allegation of misappropriation of funds – Whether there was falsity of impugned statements – Whether impugned statements misinformation – Whether impugned statements proved to be defamatory – Whether defence of qualified privilege available*

E ***TORT:*** *Defamation – Libel – Press conference contained statements alleged to be defamatory of plaintiffs – Allegation of misappropriation of funds – Whether there was falsity of impugned statements – Whether statements were comments made in the first defendant's capacity as incumbent Member of Parliament and concerned members of her constituency – Whether alleged defamatory statement an expression* F *of opinion on a matter of public interest – Whether defence of fair comment established*

TORT: *Defamation – Libel – Press conference contained statements alleged to be defamatory of plaintiffs – Allegation of misappropriation of funds – Whether there* G *was falsity of impugned statements – Whether there was malice aforethought – Whether there was evidence of dishonesty on first defendant's part when giving press conference*

The first plaintiff was the chairman and director of National Feedlot Corporation Sdn Bhd ('NFCorp') which was established to fulfil the H government's policy and objective of increasing the national production of meat by reducing dependency on imported beef. Public attention was then drawn to NFCorp whereby concerns were raised as it involved public funds and the manner it was spent. In a press conference in relation to the development of KL Eco City, the first defendant in her capacity as the I Vice President of Pakatan Keadilan Rakyat ('PKR') and a Member of Parliament ('MP') made certain statements regarding the same issue based on the exposure of alleged misappropriation of funds of the National Feedlot

Centre project. On the same day, Malaysiakini TV published the statements made by the first defendant which was viewed by the public at large. The plaintiffs averred that the impugned statements in their natural and ordinary meaning had conveyed namely that (i) the first plaintiff had used NFCorp's money as collateral and/or support to obtain a loan for the purchase of the eight condo units; and (ii) the first plaintiff and his family had misappropriated NFCorp's money to purchase the eight units for the personal use of the first plaintiff and his family and not on behalf of NFCorp. According to the plaintiffs, the impugned statements could be understood to mean that the first plaintiff was untrustworthy, a criminal, a greedy person who had used his wife's position for monetary gain, used government or public money for personal monetary gain and to live a life of luxury and that the plaintiffs had conspired to cheat and/or misappropriate government and/or public funds. The plaintiff thus filed a suit to claim for damages for defamation against the defendants. The High Court Judge dismissed the plaintiff's claim, premised on two principal reasons, namely (a) that the plaintiffs had failed to prove on the balance of probabilities that the impugned statements were defamatory of the plaintiffs; and (b) that, even if the impugned statements were defamatory, the first defendant had proven, on the balance of probabilities, the defence of justification. As a direct consequence, the first defendant was completely exonerated. Dissatisfied, the plaintiffs appealed. The issues that arose were, (i) whether the trial judge failed to consider the falsity of the impugned statements; (ii) whether the impugned statements were indeed defamatory; and (iii) whether the first defendant could avail herself of any of the defences as pleaded in her defence.

Held (dismissing plaintiffs' appeal)
Per Abang Iskandar JCA delivering the judgment of the court:

(1) The plaintiff had raised a preliminary objection that the trial judge did not hear any party orally after the case was closed for submissions. There are, however, no express legal provisions that have exalted the position of oral submission such that it must, without fail, be extended by the court to counsel in all cases. It would suffice for the court to act on written submission only, in the absence of oral submission. Thus, the preliminary objection, *to wit* the plaintiff's complaint on the lack of oral submission, was unsustainable and lacked merit. (paras 19 & 21)

(2) The impugned statements were contained in a bigger body of statement, *to wit*, the entire press release that was given by the first defendant. The impugned statements must be viewed not in isolation but rather in the context of the totality of the whole statement of which the impugned statement was but a part thereof. A reading of the whole statement that was given by the first defendant during the press conference was primarily addressed at Datuk Seri Shahrizat, the wife of the first plaintiff, who undeniably was the MP for Lembah Pantai, at the

material time when the upheaval of the squatters at Kampung Abdullah Hukum was undertaken, to make way for the high end development project of what was now known as KL Eco City near the Mid Valley Megamall Bangsar. The first defendant, being the incumbent MP for that constituency, was addressing what she perceived to be an injustice done to the squatters living at Kampung Abdullah Hukum, who had to make way for the huge development for scant compensation. The first defendant was merely performing her public duty of addressing issues of public concerns as they had impacted her constituents. Thus, the impugned statements were not defamatory as against the first plaintiff. The overarching theme of the press conference had been to highlight the conflict of interest and abuse of power which could have happened during the tenure of office of the wife of the first plaintiff when she was the MP for Lembah Pantai, where the site of the future development of the KL Eco City was situated. Viewed in that holistic approach, the sting that the plaintiffs had assigned to the impugned statements was indeed ameliorated, if not substantially neutralised. (paras 35, 37, 39 & 45)

(3) It is not the law on defamation that the whole of the impugned statements must be absolute truth. Rather, the law is that the impugned statement must be shown to be substantially true in material particular. Such is the legal position that could be availed by a defendant here under s. 8 of the Defamation Act 1957. Justification, if successfully erected, provides a complete defence for the defendant in a defamation suit. Even if the impugned statements were defamatory, the first defendant had proved, on the balance of probabilities, the defence of justification. (paras 17, 48 & 49)

(4) A defence of qualified privilege is founded on the need or duty on the part of the alleged defamer to impart information to the public at large and that there is a duty on the part of the public to receive that information. The first defendant was at the material time the MP for Lembah Pantai and the residents of Kampung Abdullah Hukum formed part of the electorate in that constituency. The wife of the first plaintiff was once the MP for that same constituency before the first defendant defeated her in the 2008 General Election. But the planning for the development affecting the residents of Kampung Abdullah Hukum had taken place during the time when the first defendant's predecessor was in office. The impugned statements were not misinformation. They were made in a press conference that was called by a sitting MP to address issues regarding what she perceived to be an apparent injustice having been perpetrated on her affected constituents in the development of a high end property, which had caused the affected residents to be relocated, so as to make way for the same development. As such, the defence of qualified privilege must be available to the first defendant. (paras 55 & 57)

(5) If a defendant can prove that the defamatory statement is an expression of opinion on a matter of public interest and not a statement of fact, the defendant can rely on the defence of fair comment. The statements made by the first defendant, read in their entirety with the rest of the press conference release, any fair minded person could honestly make such comments on the proved facts. The first defendant was merely inquiring into the subject matter of the complaint and such statements were comments made in her capacity as the incumbent MP for Lembah Pantai who had the legal duty to make those comments as they concerned the members of the public at large in general and the members of her constituency. Thus, the defence of fair comment was established. (paras 58 & 59)

(6) There was no malice aforethought on the part of the first defendant when the statements were made within the overall context of the press conference. There was clear evidence of lack of proof of dishonesty on the part of the first defendant when she gave the press conference. The plaintiffs had failed to adduce evidence that had the effect of either directly proving such dishonesty; neither could reasonable inferences be derived from the evidence adduced by the plaintiffs that the first defendant was actuated by dishonesty. Thus, there was no occasion for this court to interfere with the trial judge's decision and findings and in the circumstances, the plaintiff's claim could not succeed. (paras 61, 64 & 65)

Bahasa Malaysia *Headnotes*

Plaintif pertama ialah pengerusi dan pengarah National Feedlot Corporation Sdn Bhd ('NFCorp') yang ditubuhkan untuk memenuhi polisi dan objektif Kerajaan menambahkan pengeluaran daging lembu tempatan dengan mengurangkan kebergantungan pada daging lembu yang diimport. Perhatian awam kemudiannya ditumpukan pada NFCorp di mana kebimbangan dibangkitkan kerana ia melibatkan dana awam dan cara ia dibelanjakan. Dalam satu sidang akhbar berhubungan pembangunan KL Eco City, defendan pertama dalam kapasitinya sebagai Naib Presiden Pakatan Keadilan Rakyat ('PKR') dan Ahli Parlimen ('MP') membuat beberapa kenyataan berhubungan isu yang sama berdasarkan pendedahan dakwaan salah guna dana projek National Feedlot Centre. Pada hari yang sama, Malaysiakini TV menerbitkan kenyataan-kenyataan yang dibuat oleh defendan pertama yang dilihat oleh orang awam secara umumnya. Plaintif-plaintif menghujahkan bahawa kenyataan-kenyataan yang dipertikaikan itu dalam maksud semula jadi dan biasa menyampaikan bahawa (i) plaintif pertama telah menggunakan wang NFCorp sebagai cagaran dan/atau sokongan untuk memperoleh pinjaman bagi pembelian lapan unit kondomonium; dan (ii) plaintif pertama dan keluarganya telah menyalahgunakan wang NFCorp untuk membeli lapan unit itu untuk

kegunaan peribadi plaintif pertama dan keluarganya dan bukan bagi pihak NFCorp. Menurut plaintif-plaintif, kenyataan-kenyataan yang dipertikaikan itu boleh difahamkan bermaksud plaintif pertama tidak boleh dipercayai, seorang penjenayah, seorang yang tamak, yang telah menggunakan kedudukan isterinya untuk keuntungan kewangan, menggunakan wang Kerajaan atau pihak awam untuk keuntungan wang peribadi dan untuk hidup secara mewah dan bahawa plaintif-plaintif telah berkomplot untuk menipu dan/atau menyalahgunakan dana Kerajaan dan/atau dana pihak awam. Plaintif memfailkan guaman menuntut ganti rugi fitnah terhadap defendan-defendan. Hakim Mahkamah Tinggi menolak tuntutan plaintif-plaintif, berdasarkan dua alasan utama, iaitu (a) plaintif-plaintif gagal membuktikan, atas imbangan kebarangkalian, bahawa kenyataan-kenyataan yang dipertikaikan memfitnah plaintif-plaintif; dan (b) jikapun kenyataan-kenyataan yang dipertikaikan adalah memfitnah, defendan pertama telah membuktikan atas imbangan kebarangkalian pembelaan justifikasi Akibatnya, defendan pertama dilepaskan sepenuhnya. Tidak berpuas hati, plaintif-plaintif merayu. Isu-isu yang timbul adalah, antara lain (i) sama ada hakim bicara gagal mempertimbangkan kepalsuan kenyataan-kenyataan yang dipertikaikan; (ii) sama ada kenyataan-kenyataan yang dipertikaikan adalah memfitnah; dan (iii) sama ada defendan pertama boleh memanfaatkan mana-mana pembelaan yang diplidkan dalam pembelaannya.

Diputuskan (menolak rayuan plaintif-plaintif)
Oleh Abang Iskandar HMR menyampaikan penghakiman mahkamah:

(1) Plaintif membangkitkan bantahan awal bahawa hakim bicara tidak mendengar mana-mana pihak secara lisan selepas kes ditutup untuk penyerahan. Walau bagaimanapun, tiada peruntukan undang-undang nyata yang meningkatkan kedudukan hujahan lisan sehingga ia mesti, tanpa apa-apa kegagalan, diberikan oleh mahkamah kepada peguam dalam semua kes. Memadai untuk mahkamah bertindak atas hujahan bertulis sahaja, dalam ketiadaan hujahan lisan. Oleh itu, bantahan awal, iaitu aduan plaintif atas ketiadaan hujahan lisan, tidak boleh dikekalkan dan tiada merit.

(2) Kenyataan-kenyataan yang dipertikaikan terkandung dalam satu pernyataan yang lebih besar, iaitu, keseluruhan sidang akhbar yang diberikan oleh defendan pertama. Kenyataan-kenyataan yang dipertikaikan harus dilihat bukan secara berasingan tetapi dalam konteks menyeluruh kesemua pernyataan di mana kenyataan-kenyataan yang dipertikaikan adalah sebahagian daripadanya. Pembacaan keseluruhan penyataan yang diberikan oleh defendan pertama semasa sidang akhbar dikemukakan terutamanya kepada Datuk Seri Shahrizat, isteri kepada plaintif pertama, MP Lembah Pantai pada waktu material apabila berlakunya pergolakan penduduk setinggan Kampung Abdullah Hukum

untuk memberi laluan kepada pembangunan projek yang sekarang dikenali sebagai KL Eco City berdekatan Mid Valley Megamall Bangsar. Defendan pertama, sebagai penjawat kini MP untuk konstituensi, menangani apa yang dirasakannya sebagai satu ketidakadilan terhadap penduduk setinggan di Kampung Abdullah Hukum, yang terpaksa memberikan laluan untuk satu pembangunan besar dan hanya diberikan pampasan kecil. Defendan pertama hanya menjalankan tugas awamnya menangani isu-isu yang melibatkan kebimbangan pihak awam kerana ia telah memberi kesan kepada konstituen-konstituennya. Oleh itu, kenyataan-kenyataan yang dipertikaikan tidak memfitnah plaintif pertama. Tema sidang akhbar adalah untuk menegaskan konflik kepentingan dan salah guna kuasa yang mungkin terjadi semasa tempoh isteri plaintif pertama memegang jawatan MP Lembah Pantai, di mana kawasan pembangunan KL Eco City terletak. Dilihat dengan pendekatan holistik itu, kesengatan kenyataan-kenyataan yang dipertikaikan itu diperbaiki dan sebahagian besarnya dineutralkan.

(3) Undang-undang fitnah tidak memperuntukkan bahawa keseluruhan kenyataan yang dipertikaikan seharusnya membawa kebenaran mutlak. Sebaliknya, undang-undang memperuntukkan kenyataan-kenyataan yang dipertikaikan harus ditunjuk sebahagian besarnya benar. Ini adalah kedudukan undang-undang yang boleh digunakan oleh defendan di sini bawah s. 8 Akta Fitnah 1957. Justifikasi, jika berjaya dibuktikan, memberikan pembelaan sepenuhnya kepada defendan dalam guaman fitnah. Jikapun kenyataan-kenyataan yang dipertikaikan adalah memfitnah, defendan pertama telah membuktikan, atas imbangan kebarangkalian, pembelaan justifikasi.

(4) Pembelaan perlindungan bersyarat adalah berasaskan pada keperluan atau kewajipan pemfitnah yang didakwa menyampaikan maklumat kepada pihak awam dan pihak awam berkewajipan menerima maklumat itu. Defendan pertama pada waktu material adalah MP Lembah Pantai dan penduduk-penduduk Kampung Abdullah Hukum membentuk sebahagian daripada pengundi di kawasan itu. Isteri plaintif pertama pernah menjadi MP untuk konstituensi yang sama sebelum defendan pertama mengalahkannya pada Pilihanraya Umum 2008. Tetapi perancangan pembangunan yang menjejaskan penduduk-penduduk Kampung Abdullah Hukum telah berlaku semasa isteri plaintif pertama memegang jawatan. Kenyataan-kenyataan yang dipertikaikan bukanlah maklumat salah. Ia dibuat semasa sidang akhbar oleh seorang MP yang bersidang untuk menangani isu-isu berhubungan apa yang beliau rasa adalah satu ketidakadilan nyata terhadap konstituen-konstituen yang terjejas dengan pembangunan hartanah mewah, yang menyebabkan

penduduk-penduduk yang terjejas dipindahkan ke lokasi lain, untuk memberi laluan kepada pembangunan tersebut. Oleh itu, pembelaan perlindungan bersyarat mesti disediakan kepada defendan pertama.

(5) Jika defendan boleh membuktikan kenyataan fitnah itu adalah ungkapan pendapat atas perkara yang melibatkan kepentingan awam dan bukan kenyataan fakta, defendan boleh bergantung pada pembelaan ulasan saksama. Kenyataan-kenyataan yang dibuat defendan pertama, dibaca secara keseluruhan dengan siaran sidang akhbar selebihnya, sesiapa yang mempunyai fikiran waras boleh membuat kenyataan-kenyataan sebegitu atas fakta-fakta yang dibuktikan. Defendan pertama hanya menyoal subjek perkara aduan itu dan kenyataan-kenyataan sebegitu adalah ulasan yang dibuat dalam kapasitinya sebagai penyandang jawatan MP yang mempunyai kewajipan undang-undang untuk membuat segala ulasan-ulasan itu kerana ia berkaitan orang awam dan ahli-ahli konstituensinya. Oleh itu, pembelaan ulasan saksama dibuktikan.

(6) Tiada cita-cita niat jahat oleh pihak defendan pertama apabila membuat kenyataan-kenyataan itu dalam keseluruhan konteks sidang akhbar. Keterangan jelas menunjukkan kekurangan bukti ketidakjujuran dari pihak defendan pertama apabila beliau mengadakan sidang akhbar itu. Plaintif-plaintif gagal mengemukakan keterangan yang mempunyai kesan membuktikan ketidakjujuran; tiada inferens munasabah daripada keterangan yang dikemukakan oleh plaintif-plaintif bahawa defendan pertama didorong oleh ketidakjujuran. Dengan itu, tiada alasan untuk mahkamah ini campur tangan dengan keputusan hakim bicara dan dapatannya dan dalam keadaan sedemikian, tuntutan plaintif tidak boleh berjaya.

Case(s) referred to:

Ayob Saub v. TS Sambanthamurthi [1989] 1 CLJ 152; [1989] 1 CLJ (Rep) 321 HC ***(refd)***

Charleston and Another v. News Group Newspapers Ltd [1995] 2 AC 65 ***(refd)***

Chong Swee Huat & Anor v. Lim Shian Ghee t/a L & G Consultants & Education Services [2009] 4 CLJ 113 CA ***(refd)***

Dato' Seri Mohammad Nizar Jamaluddin v. Sistem Televisyen Malaysia Bhd & Anor [2014] 3 CLJ 560 CA ***(refd)***

Jameel v. Wall Street Journal [2006] 4 All ER 1279 ***(refd)***

Keluarga Communication Sdn Bhd v. Normala Samsudin [2006] 1 LNS 5 CA ***(refd)***

Lee Ing Chin & Ors v. Gan Yook Chin & Anor [2003] 2 CLJ 19 CA ***(refd)***

Onassis & Anor v. Vergottis [1968] 2 Lloyds Rep 403 ***(refd)***

S Pakianathan v. Jenni Ibrahim & Another Case [1988] 1 CLJ 771; [1988] 1 CLJ (Rep) 233 SC ***(refd)***

Tun Datuk Patinggi Hj Abd Rahman Ya'kub v. Bre Sdn Bhd & Ors [1995] 1 LNS 304 HC ***(refd)***

Wong Yoke Kong & Ors v. Azmi M Anshar & Ors [2003] 6 CLJ 559 HC ***(refd)***

Yusof Sudin v. Suruhanjaya Perkhidmatan Polis & Anor [2012] 1 CLJ 448 FC ***(dist)***

Legislation referred to:
Defamation Act 1957, s. 8

For the appellant - Muhammad Shafee Abdullah, Sarah Abishegam & Noor Farhah Mustaffa; M/s Shafee & Co
For the respondent - Razlan Hadri, Joshua Kevin & Azura Adnan; M/s Kevin & Co

[Editor's note: For the Court of Appeal judgment, please see Dato' Sri Mohamad Salleh Ismail & Anor v. Nurul Izzah Anwar & Anor [2016] 1 LNS 1418 (affirmed).]

Reported by Suhainah Wahiduddin

JUDGMENT

Abang Iskandar JCA:

Brief Facts Of The Case

[1] Dato' Sri Dr Mohamad Salleh bin Ismail ("the first plaintiff") is the Chairman and Director of National Feedlot Corporation Sdn Bhd ("NFCorp") and the individual of importance in the establishment and execution of the NFC project, that is a project to develop, promote, and nurture competency in the farming of beef and cattle for the production of beef and beef products.

[2] NFCorp was established in 2007 as the integrator of the National Feedlot Centre (NFC) to fulfil the Government's policy and objective of increasing the national production of meat by reducing dependency on imported beef.

[3] The auditor general's report of 2010 highlighted the failures of the NFC project and the weaknesses in the implementation of the NFC project. Public attention was drawn to NFCorp, whereby concerns were raised as it involved public funds and the manner it was spent.

[4] In a press conference in relation to the development of KL Eco City, Nurul Izzah binti Anwar ("the first defendant"/"D1") had on 7 March 2012 in her capacity as the Vice President of Pakatan Keadilan Rakyat ("PKR") and a Member of Parliament ("MP") made certain statements regarding the same issue.

[5] Those statements were made based on the exposure of alleged misappropriation of funds of the National Feedlot Centre Project which statements were made by PKR's Director of Strategy, Mohd Rafizi Ramli ("Rafizi").

[6] On the same day, Malaysiakini TV had published the statements made by Dl which was viewed by the public at large. The statements are as follows:

> Pendedahan terbaru pada hari ini oleh saudara Rafizi Ramli, bahawa dana awam yang disalurkan dalam Projek Fidlot Kebangsaan (National Feedlot

A Centre) telah digunakan untuk membeli Japan unit hartanah mewah di KL Eco City pada nilaian semasa yang mencecah RM12 juta mengundang pelbagai persoalan baru.

Pertama, tindakan suami dan keluarga seorang menteri kanan yang dahulunya ahli parlimen kawasan terbabit membeli hartanah tersebut
B menimbulkan pertembungan kepentingan (conflict of interest) di antara tugas sebagai seorang ahli parlimen dan kemahuan keluarga beliau. You would have access to the plans, development plans of a particular area if you're member of parliament, dan ada kemungkinan, pengetahuan ini digunakan dalam usaha pembelian oleh suami menteri kanan tersebut.

C ("The impugned statements").

[7] The plaintiffs contended that the impugned statements made by D1, alleging that the first plaintiff had misused Government funds for the purpose of acquiring/purchasing eight condo units at KL Eco City were false, incorrect and were defamatory of the plaintiffs.

D **[8]** The first plaintiff asserted that he had purchased the eight office units using his own personal funds and that the purchases did not involve NFCorp's money or Government funds.

[9] It was further contended that these statements were published to a third party and broadcasted by Malaysiakini TV.
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[10] The plaintiffs averred that the impugned statements in their natural and ordinary meaning, had conveyed the following meanings, namely that:

(i) The first plaintiff had used NFCorp's money as collateral and/or support to obtain a loan for the purchase of the eight condo units; and
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(ii) The first plaintiff and his family had misappropriated NFCorp's money to purchase the eight units for the personal use of the first plaintiff and his family and not on behalf of NFCorp.

[11] The impugned statements which were referred to the plaintiffs could
G be understood to mean that the first plaintiff is untrustworthy, a criminal, a greedy person, who had used his wife's position for monetary gain, used Government and/or public money for personal monetary gain and to live a life of luxury, and that the first plaintiff, if not for NFCorp's money is actually poor and/or a pauper; and finally that the plaintiffs had conspired
H to cheat and/or misappropriate Government and/or public funds.

[12] The plaintiffs had thus filed this suit to claim for damages for defamation against the defendants in respect of the impugned statements referred to above which was made on 7 March 2012 during the press conference.

I

Dl's Defence

[13] We had sight of the pleadings filed by the defendants. In the statement of defence, D1 contended that the impugned statements were made in her capacity as an MP and political figure to articulate the peoples' concerns over Datuk Seri Shahrizat Jalil's involvement with the KL Eco City project and the purchase of eight condo units in the KL Eco City wherein issues of misuse of funds for the NFC project were raised.

[14] It was the contention of D1 that the impugned statements were not defamatory of the plaintiffs. It was also Dl's contention that the impugned statements were made pursuant to credible proof obtained by Rafizi who had made prior disclosures of the misuse of public funds for NFCorp by the first plaintiff and his family members.

[15] It was also part and parcel of D1's defence that even if the impugned statements were defamatory, D1 had pleaded the defences of justification, fair comment, and qualified privilege.

[16] This case was tried before the learned High Court Judge ("trial judge") sitting at Kuala Lumpur. Her Ladyship, having considered the evidence and materials and submissions before her had concluded that the plaintiffs had failed to prove their claim against the defendants. As it had come to pass, the trial judge dismissed the plaintiffs' claim with costs of RM80,000.

[17] We had perused through Her Ladyship's grounds of judgment and it was quite apparent to us that she had dismissed the plaintiffs' claim, premised on two principal reasons, namely:

(i) that the plaintiffs had failed to prove on the balance of probabilities that the impugned statements were defamatory of the plaintiffs; and

(ii) that, even if the impugned statements were defamatory, D1 had proven on the balance of probabilities the defence of justification.

[18] As a direct consequence thereof, D1 was completely exonerated. Dissatisfied with the learned trial judge's decision, the plaintiffs had since appealed to the Court of Appeal. Hence, this appeal before us.

The Appeal

The Preliminary Point

[19] We had occasion to hear oral submissions by both learned counsel for both parties during the appeal hearing. At the start of the oral submissions, learned counsel for the plaintiff, Tan Sri Shafee bin Abdullah had raised an oral preliminary objection that pertained to what he had considered was a denial of his client's right to be heard. He contended that the learned trial judge did not hear any party orally after the case was closed for submissions by parties. She had instead relied on the written submissions as filed by parties despite having indicated to parties earlier that she would hear them

submit orally. Among others, learned counsel for the plaintiffs cited to us the Federal Court case of *Yusof Sudin v. Suruhanjaya Perkhidmatan Polis & Anor* [2012] 1 CLJ 448; [2011] 5 MLJ 465 ("*Yusof Sudin*'s case") as an illustration on how important oral submissions would play in the context of a court proceeding. On the other hand, learned counsel for D1, Encik Razian Hadri submitted before us that while oral submissions may well play an important role in assisting the court in coming to its decision at the end of the whole case, it is essentially a matter that resides in the discretion of the particular court or judge. There is no mandatory requirement that would necessitate such a procedure in all cases. In this case, both parties had filed their respective written submissions and on that factual circumstance, we noted that there was no dispute.

[20] We had referred to *Yusuf Sudin*'s case (*supra*) that was referred to us. Quite instantaneously it was clear to us that the factual matrix in that *Yusuf Sidin*'s case (*supra*) is entirely different to the one obtaining in the appeal before us. To dwell a little on that case, it had concerned a disciplinary action that was taken against Yusuf Sudin which had resulted in his ultimate dismissal from the police force of which he was a member. To go straight to the point of convergence with this appeal before us, learned counsel for Yusuf Sudin had complained, in this judicial review case that, his client was not given the right to be heard by way of oral submission. Apparently, his fate was determined by the authorities by them deliberating only on the available documentary materials, including the written representations supplied by Yusof Sudin as required under the prevailing General Orders provisions. This matter went all the way to the apex court and it was there held that, in the scheme of things under the General Orders that pertains to disciplinary actions, there was no mandatory requirement that the officer must be given oral hearing. If the written representations were sufficient in assisting the tribunal in coming to its decision, then there was no need for any recourse to be had to resort to hearing oral representations from the officer concerned. Even in such a situation as in the *Yusof Sudin*'s case, the need for oral submission was not mandatory.

[21] Our case on the other hand, presents a different scenario. The complaint as highlighted by learned counsel for the plaintiffs had involved a matter which is reposed in the discretion of the court. Submissions, whether they be oral or written, play an important role in assisting the court in appreciating the evidence and the legal principles in play in a case. But submissions, be they written or oral, are built upon the available evidence or materials already before the trial court. They put into context the respective cases for the litigating parties and how they would present their perspectives in order to convince the court in order to get a favourable decision. No amount of submissions be they written or oral, amount to evidence. There is therefore nothing in the submissions which the court did not already hear during the course of the trial. That having been said, there

are no express legal provisions that have exalted the position of oral submission such that it must, without fail, be extended by the court to counsel in all cases. Rather, it would depend on the particular judge, whether any submissions need to be filed by any party at the end of the whole case before a decision could be made. In some cases, the need for any submissions may not be relevant at all. Indeed, even after directing parties to file written submissions and for them to submit orally, there is nothing to prevent the court from changing its mind and to proceed on only the written submissions to decide even without the 'benefit' of reading written submissions or hearing oral submissions. In short, it would suffice for the court to act on written submissions only, in the absence of oral submission. Indeed, they may amplify the effect of the application of certain legal principles which may be in play. As such, nothing much could turn on the lack of oral submissions having been heard from both counsel before the learned trial judge came up with her decision. With that determination, we had found the preliminary objection, *to wit* the plaintiffs' complaint on the lack of oral submission, to be unsustainable. We had therefore dismissed it, in due course, as it lacked merit.

Main Appeal

[22] We had then proceeded to hear the oral submissions on the main appeal. After considering submissions by both parties on the preliminary objection, we had unanimously ruled that there was no merit in the plaintiffs' contention before us and we had therefore dismissed it with costs. As is clear thus far, we have been referring to parties as they appeared in the High Court. We have no desire to depart from that approach when we needed to refer to them in the course of these grounds.

[23] We would now move on to the main appeal. Learned counsel for the plaintiffs complained that the learned trial judge failed to consider the falsity of the impugned statements which can be ascertained from the evidence adduced during trial. An allegation that public funds are misused and endangered is an allegation of breach of trust including criminal breach of trust and this is defamatory. It was submitted before us that the impugned statements were indeed defamatory.

[24] It was also submitted that it was clearly obvious by innuendo that the allegation contained in the impugned statements amounted to an allegation which, at its highest a criminality, and at the lowest of gross negligence in the management of a project of public importance and the management of public funds. The repetitive reference to the first plaintiff as a member of the family of the Minister and that the owners of the second plaintiff are members of the family of the Minister gives rise to the innuendo of the plaintiffs benefiting from cronyism within the governing political class and implicitly questioned the plaintiffs' capacity to undertake the project on their own merit. Again therefore, in this context, the words are defamatory.

[25] It was also submitted before us that D1 could not avail herself of any of the defences as pleaded in her defence.

Our Findings

[26] Having perused the records of appeal and having considered the submissions by both parties, we had unanimously dismissed the plaintiffs' appeal. We now proffer our reasons for having so decided.

[27] The law on what needed to be proven by the disgruntled plaintiffs for a claim founded on the tort of defamation emanating from a libel is well settled. The case of *Ayob Saub v. TS Sambanthamurthi* [1989] 1 CLJ 152; [1989] 1 CLJ (Rep) 321; [1989] 1 MLJ 315 and the line of cases decided subsequent to that case have been consistent in reiterating the English common law principle that a plaintiff in a defamation suit must establish, on the balance of probabilities, that the following three requisite ingredients have been proven through the evidence adduced before the trial court. Those three ingredients are (1) that the words are defamatory; (2) that the words refer to the plaintiff; and (3) that the words are published.

[28] In the context of this appeal, one of those essential ingredients was admitted by D1, that is, the impugned words were published. That fact actually was an agreed fact. As such, nothing more will be said of the factum of publication by us. That was the extent of the concession made by D1. She had disputed the other two essential ingredients to this tort, namely that the impugned words are defamatory and that the words had referred to the plaintiffs.

[29] Having had the benefit of perusing through the learned trial judge's grounds of judgment, we found that she had made a finding that the impugned statements indeed had referred to the plaintiffs. This finding can be seen from paras. 29 to 33 of her grounds. We reproduce those paragraphs for ease of convenience.

> 29. In fact it is D1's pleaded defence that the whole statement was in reference to D.S. Shahrizat, the wife of the 1st Plaintiff who was previously the MP for that constituency.
>
> 30. I am of the view that words "suami dan keluarga seorang Menteri Kanan yang dahulunya Ahli Parlimen kawasan terbabit membeli hartanah tersebut" refer to the 1st Plaintiff as it is public knowledge that he is the husband of the "Menteri Kanan" D.S. Shahrizat.
>
> 31. With regard to NFCorp, I find there is reference to it as it was awarded the government loan to develop the NFC Project.
>
> 32. Despite there being no express reference to the Plaintiffs it is quite obvious that the impugned statements refer to the Plaintiffs.
>
> 33. It is therefore my finding that the impugned statements do refer to the Plaintiffs.

[30] In respect of this immediate issue above, we noted that there was no notice of appeal filed by D1 to challenge that adverse finding by the learned trial judge against her, that the words complained of had referred to the plaintiffs. As such, we will also not dwell any further on it.

[31] That had effectively left us with the task of determining the remaining issue in dispute pertaining to the proof of the tort of defamation, namely whether the impugned statements were indeed defamatory of the plaintiffs. In the trial court, this issue had been described by the learned trial judge as being the 'core contention' between the litigating parties before her. (See para. 43 of the grounds of judgment.)

[32] In the course of dealing with this issue, we noted that the learned trial judge had referred to and cited a number of decided cases and authoritative work by learned and renowned authors on the subject of defamation. The following cases were cited by the learned trial judge to illustrate what would amount to a defamatory statement which is actionable under the law: *Keluarga Communication Sdn Bhd v. Normala Samsudin* [2006] 1 LNS 5; [2006] 2 MLJ 700; *Tun Datuk Patinggi Hj, Abd Rahman Ya'kub v. Bre Sdn Bhd & Ors* [1995] 1 LNS 304; [1996] 1 MLJ 393; *Wong Yoke Kong & Ors v. Azmi M Anshar & Ors* [2003] 6 CLJ 559; [2003] 4 MLJ 96. Suffice for us to say that we found no reason or rhyme to disagree with the settled principles laid down in those cited authorities.

[33] But still we felt that it would be beneficial to produce what was written on the subject of how to approach an impugned statement in the sense of setting up the proper parameters and latitude when attempting to interpret the meaning to be given to the impugned statement. It would be a straightforward exercise if the impugned statement was contained in a single statement containing no other information. However, where the impugned statement was contained within a bigger or larger statement, a different approach would need to be undertaken by the trial judge. The impugned statements that had become the bone of contention in this appeal must belong squarely to the second mentioned category above. For that, we found no guide better than what *Gatley on Libel & Slander*, 10th edn, has to say on the subject matter. This is what it has said:

> It is necessary to take into consideration, not only the actual words used, but the context of the words. It follows from the fact that the context and circumstances of the publication must be taken into account, that the plaintiff cannot pick and choose parts of the publication which, standing alone, would be defamatory. This or that sentence may be considered defamatory, but there may be other passages which take away the sting.

[34] Reverting to the impugned statements, learned counsel for the plaintiffs repeated the plaintiffs' contentions that were placed before the learned trial judge before us. Essentially, it was his contention that the

impugned statements were false. It was also submitted before us that DI was not successful in establishing any of the pleaded defences. In the circumstances therefore, D1 ought to have been found liable for the defamatory statements which she had published during the press conference that was held on 7 March 2012. On the same token, learned counsel urged this court to allow the plaintiffs' appeal with costs.

[35] As alluded to earlier by us, the impugned statements were contained in a bigger body of statement, *to wit*, the entire press release that was given by D1. As such, the guiding principle involved must necessarily be the one as stated in the work by *Gatley on Libel & Slander* (*supra*) namely that the impugned statements must be viewed not in isolation, but rather in the context of the totality of the whole statement of which the impugned statement was but a part thereof. This court in the case of *Keluarga Communications v. Normala Shamsuddin* (*supra*) had reiterated that principle in the following manner:

> [15] At the outset, we would state that the test to be applied when considering whether a statement is defamatory of a plaintiff is well settled in that it is an objective one in which it must be given a meaning a reasonable man would understand it and for that purpose, that is, in considering whether the words complained of contained any defamatory imputation, it is necessary to consider the whole article. *Gatley on Libel & Slander* (10th Ed) on this point at pp 108 and 110, *inter alia*, states as follows:
>
> > It is necessary to take into consideration, not only the actual words used, but the context of the words.
> >
> > It follows from the fact that the context and circumstances of the publication must be taken into account, that the plaintiff cannot pick and choose parts of the publication which, standing alone, would be defamatory. **This or that sentence may be considered defamatory, but there may be other passages which take away the sting**. (emphasis added)
>
> [16] Still on the same point in the case of *Charleston v. News Group Newspapers Ltd* [1995] 2 AC 65. Lord Bridge of Harwich in delivering the speech of the House of Lords at p. 70 had quoted this passage as follows:
>
> > ... the question here is, whether the matter be slanderous or not, which is a question for the jury; who are to take the whole together, and say whether the result of the whole is calculated to injure the plaintiff's character. **In one part of this publication, something disreputable to the plaintiff is stated, but that is removed by the conclusion; the bane and the antidote must be taken together**. (emphasis added)

[36] We agreed with the learned trial judge in her approach when she undertook the exercise of viewing the impugned statement from a holistic approach. We found the statement to that effect in para. 37 of her grounds of judgment where she said:

> It is equally well established that the whole statement must be looked at as a whole and not just selected extracts of the statement ...

[37] We were in complete agreement with the learned trial judge in her approach. She had directed her mind correctly in that regard. Applying that approach, she had concluded that a reading of the whole statement that was given by D1 during the press conference was primarily addressed at Datuk Seri Shahrizat, the wife of the first plaintiff, who undeniably was the Member of Parliament for Lembah Pantai, at the material times when the upheaval of the squatters at Kampung Abdullah Hukum was undertaken, to make way for the high-end development project of what is now known as KL Eco City near the Mid-Valley Megamall Bangsar. D1, being the incumbent Member of Parliament for that constituency, was addressing what she perceived to be an injustice done to the squatters living at Kampung Abdullah Hukum, who had to make way for the huge development for scant compensation. The underlying theme of Dl's press statement was the perceived injustice that had been brought to bear by the conflict of interest that happened as the wife of the first plaintiff was the incumbent Member of Parliament at the material time culminating in the purchases of the eight units of condominiums that were part of the KL Eco City Development Project.

[38] That was the approach that was undertaken by the learned trial judge in determining the true effect of the impugned statements that were alleged to have been defamatory of the plaintiffs. As alluded to earlier, that approach was not inconsistent with the approach undertaken by this court in the *Normala Shamsuddin* case (*supra*) where the Court of Appeal had ruled that an objective test must be applied and that a meaning which a reasonable person would understand the whole article to mean, must be assigned to it. In trying to achieve that, it needed to be reiterated that the whole article, and not just the selected impugned statements, would have to be considered so as not to lose the context in which the alleged defamatory statements were published. Viewed as it were, in such a manner, the alleged 'sting' may be fully appreciated. We now reproduce the transcript of Dl's press statement dated 7 March 2012 as follows:

> Was Shahrizat involved in KL Eco City project?
>
> MalaysiaKini.tv
>
> 7 March 2012
>
> NURUL IZZAH ANWAR
>
> Memberikan satu kenyataan berkait dengan property ataupun hartanah di KL Eco City dimana saya telah membawa isu pembangunan sebidang tanah di dalam kawasan parlimen Lembah Pantai yang telah mengetepikan kebajikan rakyat di dalam sidang Dewan Rakyat yang lepas.

Kalau sesiapa yang selalu pergi ke megamall, tahulah bertentangan sahaja ada projek terbesar yang di panggil KL Eco City oleh pembangunan hartanah SP Setia dijalankan secara usahasama dengan DBKL, 60% DBKL, 40% SP Setia, joint venture.

Projek pembangunan hartanah mewah, KL Eco City ini bernilai RM6 billion Gross Development Value, Melibatkan SP Setia, DBKL dan syarikat milik Pergerakan Pemuda UMNO iaitu Yayasan Gerak Bakti Kebangsaan, telah mendapat perhatian ramai berikutan nasib yang menimpa penduduk-penduduk berpendapatan rendah yang mendiami tanah tersebut pada asalnya.

Pendedahan terbaru pada hari ini oleh saudara Rafizi Ramli, bahawa dana awam yang disalurkan oleh Projek Fidlot Kebangsaan (National Feedlot Centre) yang telah digunakan untuk membeli lapan unit hartanah mewah di KL Eco City pada nilaian semasa yang mencecah RM12 juta mengundang pelbagai persoalan baru.

Pertama, tindakan suami dan keluarga seorang menteri kanan yang dahulunya ahli parlimen kawasan terbabit membeli hartanah tersebut menimbulkan pertembungan kepentingan (conflict of interest) di antara tugas sebagai seorang ahli parlimen dan kemahuan keluarga beliau. You would have access to the plans, development plans of a particular area if you're member of parliament, dan ada kemungkinan, pengetahuan ini digunakan dalam usaha pembelian oleh suami menteri kanan tersebut.

Dalam kes pembangunan KL Eco City yang melibatkan pemindahan penduduk berpendapatan rendah yang tidak diberikan pampasan yang berpatutan, khusus Kampung Haji Abdullah Hukum, bukan keluarga Haji Abdullah Hukum tapi ada ramai yang tidak mendapat access pada perumahan, dan kebanyakan mereka dipindahkan di apartment Putra Ria dan juga apartment Haji Abdullah Hukum, low cost apartments, certainly. Berlainan macam langit dengan bumi dengan pembangunan yang dirancang di KL Eco City.

Jika beliau, Datuk Seri Shahrizat Jalil, bersedia, Datuk Seri Shahrizat Jalil, untuk menerangkan kepada rakyat samada beliau memainkan apa-apa peranan, mempengaruhi keputusan sehingga menyebabkan pemindahan penduduk berpendapatan rendah di Kampung Abdullah Hukum. Jika beliau mengambil sikap sambil lewa dalam membela nasib penduduk yang terbabit sejak sebuah syarikat usaha sama diwujudkan pada tahun 2007, ini menimbulkan pertanyaan samada ini ada kena mengena dengan kepentingan keluarga beliau yang berhasrat membeli tanah di KL Eco City.

Persoalan-persoalan moral ini termasuklah jumlah pampasan yang sewajarnya diberikan kepada semua penduduk terbabit, mereka bangkitkan kepada saya, tidak mencukupi dan sebagainya adalah lanjutan daripada isu-isu yang saya bawa di Dewan Rakyat berkenaan ketidakpedulian pimpinan Pemuda UMNO yang mendapat durian runtuh berjumlah RM75 juta daripada projek ini. Kerana tanah pada asalnya, alasan diambil alih oleh Yayasan Gerak Bakti Kebangsaan adalah untuk menjaga kepentingan hartanah Bumiputera, tapi diatas share-swap yang

berlaku, mereka mendapat keuntungan durian runtuh, dalam bentuk saham RM75 juta dan SP Setia sekarang mengusahakan tanah tersebut bersama usaha sama DBKL.

Kepimpinan Pemuda UMNO terlibat secara langsung dalam Pembangunan KL Eco City khusus dalam tindakan pemindahan penduduk melalui syarikat YGP Holdings Sdn Bhd yang merupakan rakan kongsi awal KL Eco City iaitu pemaju yang juga anak syarikat kepada SP Setia.

Pengarah-pengarah Yayasan Gerak Bakti YGP Holdings Sdn Bhd, termasuklah Ketua Pemuda UMNO, saudara Khairy Jamaluddin dan pimpinan Pemuda UMNO seperti Datuk Abdul Rahman Dahlan dan Datuk Megat Firdaus Megat Junid. Saya menunggu jawapan daripada Ketua Wanita dan Ketua Pemuda UMNO mengenai penglibatan mereka di dalam sebuah projek yang meminggirkan kepentingan rakyat berpendapatan rendah di Lembah Pantai sementara rakan-rakan kepimpinan Keadilan yang lain mendesak pertanggungjawaban dari keluarga menteri yang menggunakan dana awam untuk membeli harta peribadi.

[39] Having employed the approach of looking at the whole of the press conference by D1, the learned trial judge had concluded that it was not defamatory as against the first plaintiff. She had found that Dl was merely performing her public duty of addressing issues of public concerns as they had impacted on her constituents. She agreed with the submissions of learned counsel for D1 that the issues which Dl had raised in her press conference had taken away the sting of the selected statements from the press conference which the plaintiffs had complained were defamatory against them. The learned trial judge had expressed her findings on whether the impugned statements were defamatory or not in para. [66] of her grounds of judgment, thus:

[66] It is clear from a reading of this whole statement that Dl's focus was D.S. Shahrizat rather than her spouse or family. Read as a whole, a reasonable man would, to my mind, consider the statement to be a call to accountability directed at D.S. Shahrizat as the main thrust of the statement called into question D.S. Shahrizat's role as a MP for the constituency then and her involvement in the KL Eco City project wherein lay a possible conflict of interest on her part. Throughout the statement it is obvious that Dl was highlighting the plight of the residents of Kg. Hj. Abdullah Hukum who had been displaced without adequate compensation. The conflict of interest highlighted was in relation to the purchase of the 8 units by her husband, the 1st Plaintiff and other family members which units were constructed in the very place from which the residents of Kg. Hj. Abdullah Hukum had been evicted.

(See pp. 30-31 of rekod rayuan tambahan.)

[40] In para. [68] of the same grounds, she spelled out her findings on the alleged 'sting', thus:

> [68] Read in that light, it is my finding that "the sting of the charge" that the Plaintiffs complain of cannot be sustained. The Plaintiffs cannot pick and choose parts of the press statement and highlight only certain statements as defamatory and turn a blind eye to the rest.

[See p. 31 of rekod rayuan tambahan.]

[41] She concluded at para. [82] of her grounds that the plaintiffs had failed to prove, on the balance of probabilities that the impugned statements were defamatory of the plaintiffs. With respect, we agreed with her conclusion. In as much as there may be venom in the impugned statements taken in isolation assuming the statements were directed at the plaintiffs, which they were not, but applying the holistic approach as expounded in *Gatley on Libel & Slander (supra)* the antidote was also contained in whole press statement which had the effect of ameliorating the alleged 'sting' that was complained of by the plaintiffs.

[42] As it had come to pass, the learned trial judge had proceeded to consider the defence of justification, in an abundance of caution, in the event that she was wrong in holding that the impugned statements were not indeed defamatory as against the plaintiffs and that there was antidote to tamper the 'sting' occasioned by the said defamatory statements.

[43] On justification, the learned trial judge had also made a finding on the conflict of interest that was referred to in the press statement by Dl. This appeared in para. [84] of her grounds of judgment, like so:

> [84] D1 had explained in her testimony why she had said there was a conflict of interest. Questions raised, even in Parliament of the inadequate compensation offered to the displaced residents of Kg. Hj. Abdullah Hukum went unanswered. Bearing in mind the 1st Plaintiff's wife was then the MP and head of Wanita UMNO Malaysia and UMNO Youth had interests in the disputed land which was of high commercial value, DI had raised these issues particularly when it was disclosed by Rafizi through his press statement and bank statements which were not disputed by the Plaintiffs that D.S. Shahrizat's family members had purchased not I but 8 units totaling more than RM8 million in value in the Eco City Project, a project that had generated much controversy.

(See p. 35 of the rekod rayuan tambahan.)

[44] As such, there was substantial truth in the press conference which was on the conflict of interest surrounding the wife of the first plaintiff when she was the Member of Parliament for Lembah Pantai. There was also no malice proven by the plaintiffs.

[45] With respect, we were not convinced that the learned trial judge had been wrong, let alone plainly wrong in her conclusion to that effect. In the course of his submission on the defamatory character of the impugned

statements, learned counsel for the plaintiffs had emphasised on the issue of the fact that the D1 had alleged that the first plaintiff had used the deposit sum of about RM71 million (the NFC's soft loan given by the Government) with the Public Bank as a leverage in order that the said bank would approve the plaintiff's application for loans to finance the purchases of the eight units. Looking at the whole press statement, it cannot be denied that the overarching theme of the press conference had been to highlight the conflict of interest and abuse of power which could have happened during the tenure of office of the wife of the first plaintiff when she was the Member of Parliament for Lembah Pantai, where the site of the future development of the KL Eco City was situated. Viewed in that holistic approach, we agreed with the learned trial judge that the 'sting' that the plaintiffs had assigned to the impugned statements was indeed ameliorated, if not substantially neutralised.

[46] As regards the issue of leverage it had pertained to the alleged 'use' of part of the NFC soft loan money from the Government which was deposited at the Public Bank. It was not D1's case that the money so deposited was actually used to pay for the purchases of the eight units of condominiums but rather the deposit was used as a leverage for the loan that was applied for by the first plaintiff to help finance such purchases which amounted to nearly RM9 million in all. D1 had produced bank documents to show that the deposits of RM71 million were placed with Public Bank. This was denied by the first plaintiff. As such, there was a shift of evidential burden to the first plaintiff to show that the first plaintiff was a person of means to be able to pay for the deposits for the purchase of the eight units or that he did not in any way, rely or use the deposit for the purchase of his purchasers. On this issue, learned counsel for the plaintiffs had submitted that in essence, this case was not about whether the first plaintiff was a man of means, but whether he had abused public funds. We found that attempt at distinguishing between the two scenarios to be not helpful at all in the sense that one cannot entirely divorce or completely decouple the two altogether from one another. As such, we found that it was entirely germane for the learned trial judge to note that the averments made by the first plaintiff from the witness box in court, on the source of income to finance the purchase of eight units of condominiums to be mere bare assertions without more. No documentary proof of any sort was tendered by the first plaintiff to back up his averments on the source of finance.

[47] A statement which is materially true cannot be defamatory, however hurtful the statement may be. The quintessence of defamation is the spreading, by way of publication of falsehoods, laced as it were, with malice, for good measure. A plaintiff in a defamation suit is aggrieved because the falsity of the allegation has caused adverse implications on his reputation such that damages must flow from the defendant on successful proof by the

plaintiff of the alleged defamation. The burden lies with the plaintiff to establish by evidence that there was malice that had actuated the defendant's defamatory statement. The present appeal is no exception.

[48] Now, it is not the law on defamation that the whole of the impugned statements must be the absolute truth. Rather, the law is that the impugned statement must be shown to be substantially true in material particular. That is the position under the English common law. Such is also the legal position that could be availed by a defendant here under s. 8 of the Defamation Act 1957. Section 8 states as follows:

> In an action for libel or slander in respect of words containing two or more distinct charges against the plaintiff, a defence of justification shall not fail by reason only that the truth of every charge is not proved if the words not proved to be true do not materially injure the plaintiff's reputation having regard to the truth of the remaining charges.

[49] So, both at common law, as well as under our very own statutory regime, justification, if successfully erected, provides a complete defence for the defendant in a defamation suit. Learned Justice Zainun Ali JCA (as she then was) had occasion to interpret and explain the ambit of the said s. 8, thus:

> In other words a purposive approach is taken in interpreting s. 8 - when for a defence of justification to be upheld, it is not necessary to prove the truth of every word in the statement said to be defamatory. **What is relevant is actually the truth of the imputation of the overall statement**.
>
> (emphasis added.)

[See the case of *Chong Swee Huat & Anor v. Lim Shian Ghee [t/a L&G Consultants & Education Services* [2009] 4 CLJ 113; [2009] 3 MLJ 665]

[50] As we had alluded to earlier, the learned trial judge had applied the holistic approach of looking at the whole of the press release held by D1 on 7 March 2012 as opposed to merely looking at the two paragraphs that had been singled out by the plaintiffs as containing the malicious sting that had aggrieved them, in isolation.

[51] The learned trial judge had at para. [83] concluded that:

> Even if the impugned statements are defamatory, I am of the view that D1 has proved, on the balance of probabilities the defence of justification. In this regard, I concur with the submission of learned counsel for the Defendant that justification has been proved.

[52] We had occasion to consider the findings made by the learned trial judge on this pleaded defence of justification and they had appeared in paras. [83-86] of her grounds. Again, we found no reason or rhyme whatsoever to disagree with her.

[53] Apart from erecting the defence of justification, DI had also raised in her defence the defence of qualified privilege and the defence of fair comment. We noted that the learned trial judge did not make any findings on these pleaded defences. There was no cross-appeal by DI against such omission by the learned trial judge. But, bearing in mind that the appeal by the plaintiffs was against the whole decision of the learned trial judge, we were of the view that on account of that circumstance, the matter of the two other pleaded defences of D1 must be regarded as being live issues that ought to merit our consideration. It was not lost on us that an appeal is essentially a re-hearing by way of looking at the evidence adduced before the trial court and decide accordingly so that at the end of the day, no miscarriage of justice be occasioned to any of the litigating parties.

[54] Having perused through the appeal records and the submissions of respective parties, we also found that the defences of qualified privilege and fair comment as pleaded by DI had also been made out by the evidence as led before the learned trial judge.

[55] A defence of qualified privilege is founded on the need or duty on the part of the alleged defamer to impart information to the public at large and that there is a duty on the part of the public to receive that information. In a defence of qualified privilege, unlike justification, truth is not a prerequisite but it can only succeed if there is no malice in such publication. If untrue defamatory allegations are published on an occasion of privilege, they will be protected from a claim for defamation. Although the law of defamation exists to protect reputations, it is recognised that in particular situations it is to the benefit of society generally for people to be able to communicate without the fear of being sued for defamation. This is so despite the risk that a person's reputation will be damaged and they will not be able to restore it by bringing a claim for defamation. Its rationale resides in the wider consideration that a general public good in such exercise overrides the need to protect individual reputation.

[56] That having been said, nevertheless, not all defamatory statements published in the name of fulfilling public need for information, would invariably attract the defence of qualified privilege, especially in the context of journalistic reporting. In the case of *Jameel v. Wall Street Journal* [2006] 4 All ER 1279 [HL], Lord Bingham of Cornhill had occasion to state that there was no duty on the part of the public to receive misinformation, much less those laced with defamatory undertones. At para. [32] of His Lordship's speech, he had stated:

> [32] Qualified privilege as a live issue only arises where a statement is defamatory and untrue. It was in this context, and assuming the matter to be one of public interest, that Lord Nicolls proposed ([1999] 4 All ER 609 at 623, [2011] 2 AC 127 at 202) a test of responsible journalism, a test repeated in *Bonnick v. Morris* [2002] UKPC 31 at [22]-[24], [2002] 12 BHRC

A 558 at [22]-[24], [2003] 1 AC 300. The rationale of this test is, as I understand, that there is no duty to publish and the public have no interest to read material which the publisher has not taken reasonable steps to verify. As Lord Hobhouse observed with characteristic pungency ([1999] 4 All ER 609 at 657, [2001] 2 AC 127 at 238), 'No public interest is served by publishing or communicating misinformation'. But the
B publisher is protected if he has taken such steps as a responsible journalist would take to try and ensure that what is published is accurate and fit for publication.

[57] In the context of this case, D1 was at the material time the Member of Parliament for Lembah Pantai and the residents of Kampung Abdullah
C Hukum formed part of the electorate in that constituency. The wife of the first plaintiff was once the Member of Parliament for that same constituency before D1 defeated her in the 2008 general election. But the planning for the development affecting the residents of Kampung Abdullah Hukum had taken place during the time when DI's predecessor was in office. As it had come
D to pass, the residents were relocated with scant compensation having been paid to them. In the context of the circumstances, the defence of qualified privilege must be available to D1. DI was not a journalist. The impugned statements were not misinformation of the kind that was alluded to by Lord Hobhouse that was referred to by Lord Bingham in the *Jameel* case (*supra*).
E They were made in a press conference that was called by a sitting Member of Parliament to address issues regarding what she perceived to be an apparent injustice having been perpetrated on her affected constituents in the development of a high-end property, which had caused the affected residents to be relocated, so as to make way for the same development. As such, it is
F our view that on the evidence, the defence of qualified privilege must be available to D1 in the circumstances. We had found such to be the case here.

[58] As for fair comment, the law on the defence of fair comment amounts to this. If a defendant can prove that the defamatory statement is an expression of opinion on a matter of public interest and not a statement of
G fact, he or she can rely on the defence of fair comment. The courts have said that whenever a matter is such as to affect people at large, so that they may be legitimately interested in, or concerned at, what is going on or what may happen to them or to others, then it is a matter of public interest on which everyone is entitled to make fair comment. It is also a requirement that the
H comment must be based on true facts which are either contained in the publication or are sufficiently referred to. It is for the defendant to prove that the underlying facts are true. If he or she is unable to do so, then the defence will fail. As with justification, the defendant does not have to prove the truth of every fact provided the comment was fair in relation to those facts which are proved. However, 'fair' in this context, does not mean reasonable, but
I rather, it signifies the absence of malice. The views expressed can be exaggerated, obstinate or prejudiced, provided they are honestly held. (See, the case of *Dato' Seri Mohammad Nizar Jamaluddin v. Sistem Televisyen Malaysia Bhd & Anor* [2014] 3 CLJ 560.]

[59] We agreed with the submission by learned counsel for D1 that the statements, read in their entirety with the rest of the press conference release, any fair-minded person could honestly make such comments on the proved facts. D1 was merely inquiring into the subject matter of the complaint and such statements are comments made in her capacity as the incumbent Member of Parliament for Lembah Pantai who had the legal duty to make those comments as they concerned the members of public at large in general and the members of her constituency, in particular. This view was in fact agreed to by the first plaintiff when he was cross-examined by learned counsel for D1 to the effect that the statements made were more with regard to public concerns or issues. At p. 144 part. B, appeal record, the following evidence appears:

> Q: Refer B11, Pages 9, you agree with me that except for para 4, the statements were made with regard to public concern accept [*sic*] for para 4.
>
> A: Agree.

[60] As could be seen above, for the defences to be legitimately denied from D1, the plaintiffs must show that there was malice on the part of D1 when the defamatory statement was published. The burden of proving malice lies squarely on the shoulders of the plaintiffs, as has been established by case authority. We are of the view that malice, not unlike intention, is a state of mind. Invariably, unless there is an express admission by D1 that she has been malicious in her conduct, then the presence of malice can only be deduced or inferred from the circumstances obtaining in each case. In the case of *S Pakianathan v. Jenni Ibrahim & Another Case* [1988] 1 CLJ 771; [1988] 1 CLJ (Rep) 233; [1988] 2 MLJ 173, Wan Hamzah J (as he then was) had this to say on the subject matter of malice, at p. 242 (CLJ); p. 179 (MLJ) of the report:

> Where the defendant purposely abstained from inquiring into the facts or from availing himself of means of information which lay at hand when the slightest inquiry would have shown the true situation, or where he deliberately stopped short in his inquiries in order not to ascertain the truth, malice may rightly be inferred.

[61] In the circumstances of this appeal before us, we agreed with the learned trial judge that there was no malice aforethought on the part of D1 when the statements were made within the overall context of the press conference. There was clear evidence of lack of proof of dishonesty on the part of D1 when she gave the press conference. The plaintiffs had failed to adduce evidence that had the effect of either directly proving such dishonesty; neither could reasonable inferences be derived from the evidence adduced by the plaintiffs that DI was actuated by dishonesty. In essence, we agreed with the submission by learned counsel for D1 that the press conference and the impugned statements taken in their entirety, as opposed

to the isolated impugned paragraphs, would establish the fact that D1 had merely sought for a clarification and/or explanation from the wife of the first plaintiff regarding the issue involving the residents of Kampung Haji Abdullah Hukum and KL Eco City Development Project.

Conclusion

[62] In the upshot, we could not see how we ought to invoke our appellate powers to disturb the decision of the learned trial judge. We were ever mindful of the observation attributable to Lord Pearce in the case of *Onnasis & Anor v. Vergottis* [1968] 2 Lloyds Rep 403, on the proper invocation of appellate powers of the Court of Appeal of England. At p. 430 the learned Lawlord had this to say:

> The functions of a Court of Appeal is to set aside a Judgement that should not be allowed to stand because it occasions a miscarriage of justice. That wrong or miscarriage of justice may consist of a Judgement in favour of the wrong party. It may also consist of a failure in the judicial process to which both parties are entitled as of right, namely, the weighing of their respective cases and contentions. Such failure may constitute a wrong or miscarriage of justice even though it may appear that the appellant may in the end fail to secure a Judgment in his favour. **But the fact that the right party seems to have succeeded in the court below will naturally make a Court of Appeal extremely reluctant to interfere, and it would only do so in the rarest cases**. Such matters are questions of degree. (emphasis added.)

[63] In this case, the right party seemed to have succeeded in the trial court and as such the extreme reluctance to interfere could not be lightly uplifted from our collective minds, so to speak, unless it had been shown by the plaintiffs that the impugned decision has been one that is plainly wrong, such that no reasonable tribunal could have arrived at the impugned decision, as did the trial court. That 'plainly wrong test' is attributable, at least in the local context, to the decision in the apex court case of *Lee Ing Chin & Ors v. Gan Yook Chin & Anor* [2003] 2 CLJ 19; [2003] 2 MLJ 97.

[64] Applying the above test on appellate intervention to the evidence and circumstances before us pertaining to this appeal, we saw no occasion why we should interfere with the learned trial judge's decision and findings. Suffice to say that the learned trial judge could not be described, after due analysis by us, as one that was plainly wrong, such that our appellate intervention was necessary in order to avoid an injustice being occasioned to the plaintiffs.

[65] To recap, we agreed with the learned trial judge that the impugned statements were not defamatory. We agreed, too, that even if they were indeed defamatory, D1 had succeeded in proving justification. We also found that the defences of qualified privilege and fair comment were also established on the evidence adduced at trial. Finally, we agreed that the

plaintiffs failed to prove malice that D1 had been actuated by malice in making the impugned statements. In the circumstances, we agreed that the plaintiffs' claim could not succeed. This had been a case where it was not venom all the way for within the larger consideration of the entire press release, to borrow the colourful language of Lord Bridge of Harwich in the case of *Charleston and Another v. News Group Newspapers Ltd* [1995] 2 AC 65, its antidote was also present which had blunted the bane of the alleged sting.

[66] Premised on the above-mentioned reasons, we had dismissed the appeal by the plaintiffs, with agreed costs of RM50,000 subject to payment of allocator fees. We had also ordered that the deposit to be refunded to the plaintiffs, being the appellants in this appeal.